MIAMIBEACH

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Interoffice Memorandum

To: Mayor Matti Herrera Bower, Vice-Mayor Deede Weithorn, City Commissioners Jorge Exposito, Michael Gongora, Jerry Libbin, Edward L. Tobin, Jonah Wolfson

Cc: Jorge Gonzalez, City Manager

From: Jose Smith, City Attorney

Date: December 10, 2009

Subject: *Florida Carpenters Regional Council v City of Miami Beach,* Dismissal of Amended Complaint

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MAYOR/COMMISS.
BY

I am pleased to report that Federal District Court Judge Cecilia Altonaga dismissed a constitutional challenge to the City's noise ordinance asserted by the Florida Carpenters Regional Council, a labor organization that was protesting against the Loews South Beach Hotel and contractors working on the property.

The Council alleged that the City's noise ordinance was unconstitutional on its face and as-applied to the Council's use of sound amplification during its protest activities. The Council claimed that the noise ordinance was vague and overbroad and that the City's Code Compliance Officers violated the First Amendment by citing the Council on five occasions for its unreasonably loud megaphone usage. The Council sought a preliminary injunction preventing the City from enforcing the noise ordinance, damages and attorneys' fees.

Judge Altonaga dismissed the Complaint, first holding that the Council's megaphone is a "machine or device for the producing . . . of sound" within the clear meaning of the City's noise ordinance and, as a result, the Council's facial challenge failed to state a claim. Second, Judge Altonaga held that the Council failed to state an as-applied constitutional challenge based on either selective enforcement or arbitrary and subjective enforcement of the noise ordinance. Finally, the Court held that the Council failed to state a claim for municipal liability. The Council's motion for preliminary injunction was also denied.

The order was issued after the submission of numerous memoranda of law and several oral arguments before the District Court. A copy is attached for your review.

First Assistant City Attorney Sherry Sack and Sr. Assistant City Attorney Kimberly McCoy were primarily involved on the case and should be commended for their excellent advocacy skills.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-22329-CIV-ALTONAGA/Brown

FLORIDA CARPENTERS
REGIONAL COUNCIL,

Plaintiff,

vs.

CITY OF MIAMI BEACH, *et al.*,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant, City of Miami Beach's ("City['s]") Motion to Dismiss First Amended, Verified Complaint ("Motion to Dismiss") [D.E. 33], filed October 13, 2009. The Court has considered the parties' written submissions and the applicable law.

I. BACKGROUND

Plaintiff, Florida Carpenters Regional Council ("Council"), filed this suit against the City on August 6, 2009. (*See* Compl. [D.E. 1]). When the City moved to dismiss the Complaint, the Council filed its First Amended, Verified Complaint ("Amended Complaint") [D.E. 14]. Count I of the Amended Complaint alleges the City's noise ordinance is facially unconstitutional under the First Amendment. (*See Am. Compl.* ¶¶ 42–43). Count II alleges the City has unconstitutionally applied the noise ordinance to the Council's picketing activities at Loews Hotel ("Hotel") in Miami Beach.[1] (*See id.* ¶¶ 44–53).

The Council is an unincorporated labor organization that represents carpenters, millwrights,

[1] The Council voluntarily dismissed Count III, which alleged the City's code enforcement officers individually violated the Council's First Amendment rights. (*See* Sept. 30, 2009 Order [D.E. 24]).

and related crafts throughout the State of Florida. (*See id.* ¶¶ 2, 12). The Council organizes workers to bargain collectively through the Council and affiliated unions, negotiates and enforces collective bargaining agreements that affect employees' working conditions, and publicizes two types of employers: (1) those who violate labor and employment laws and (2) those who employ workers at sub-standard wages and benefits. (*See id.* ¶ 12).

On June 19, 2009, the Council's employees and agents began demonstrating near the Hotel, located at 1601 Collins Avenue in Miami Beach. (*See id.* ¶ 13). At first, two Council members held a banner that read "Shame on Loews — Labor Dispute." (*See id.* ¶ 14). A few days later, on June 25 and 26, the Council's demonstrators distributed handbills to the public concerning the labor dispute. (*See id.* ¶ 15). Thereafter, from June 27 through September 15 — with the exception of July 11 and 12 — the Council picketed on the public sidewalks that surround the Hotel on the east, west, and south. (*See id.* ¶¶ 16–17). During the picketing, the demonstrators chanted slogans and sometimes used hand-held, battery-powered megaphones, which have volume meters from 0 to 10. (*See id.* ¶ 18). The demonstrators, who were on public property, demonstrated between 9:00 a.m. and 3:00 p.m. (*See id.* ¶ 19).

At the instigation of the Hotel's employees, City code enforcement officers and police officers appeared at the demonstrations on almost a daily basis. (*See id.* ¶ 20). The City's code officers enforce the City's noise ordinance, section 46-152 of the City Code.[2] (*See id.* ¶ 21). On

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[2] Section 46-152 provides as follows:

Sec. 46-152. Adoption of county code section by reference; unnecessary and excessive noises prohibited.

Section 21-28 of the Code of Miami-Dade County, entitled "Noises; unnecessary and excessive prohibited," is recognized as being in force in the city and is hereby adopted by reference as if fully set forth herein, as that code may be amended from time to time. All

June 30, 2009, a code enforcement officer issued the Council a Written Warning for violating section 46-152 because there was an "unreasonably loud protester with megaphone" in front of the Hotel on Collins Avenue.[3] (Written Warning [D.E. 33-1]). Section 46-152 adopts by reference section 21-28 of the Miami-Dade County Code. *See* CITY CODE, *supra*, § 46-152. Section 21-28 of the County Code, which prohibits unnecessary and excessive noise, provides:

> [i]t shall be unlawful for any person to make, continue, or cause to be made or continued any unreasonably loud, excessive, unnecessary or unusual noise. The following acts, among others, are declared to be unreasonably loud, excessive, unnecessary or unusual noises in violation of this section, but this enumeration shall not be deemed to be exclusive . . . .

CODE OF MIAMI-DADE COUNTY, FL. § 21-28. Section 21-28 then lists 12 types of conduct that violate the prohibition against unreasonably loud, excessive, unnecessary, or unusual noise. *See id.* Subsection (b) — the only one at issue in this case — prohibits:

> (b) *Radios, televisions, phonographs, etc.* The using, operating, or permitting to be played, used or operated any radio receiving set, television set, musical instrument, phonograph, or other machine or device for the producing or reproducing of sound in such manner as to disturb the peace, quiet and comfort of the neighboring inhabitants . . . .

Id. § 21-28(b).

After the warning, the Council continued demonstrating. A City code enforcement officer

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> code inspectors . . . are authorized and directed to enforce the provisions of said section 21-28 and the provisions of this article.

CODE OF THE CITY OF MIAMI BEACH, FL. § 46-152.

[3] A written warning is a legal prerequisite to a citation under the City Code. *See* CITY CODE, *supra*, § 46-158(b)(2). Although the Amended Complaint does not mention the warning, the City attached it as an exhibit to its Motion to Dismiss. As the warning is a public record that is central to the Council's claim, the Court may take judicial notice of the warning at the motion to dismiss stage. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277–80 (11th Cir. 1999) (holding a court may take judicial notice of public SEC filings at the motion to dismiss stage in order to determine what statements the documents contain).

issued the first citation on July 1, 2009 (*see Am. Compl.* ¶ 24); the citation noted a "protestor with bullhorn/megaphone [was] unreasonably, unnecessarily loud" in violation of section 46-152 (Ex. 1 [D.E. 14-2]). Shortly thereafter, on July 7, the parties' attorneys and representatives conferred via telephone. (*See Am. Compl.* ¶ 26). The next day the Council's Director of Special Projects, its Manager of Special Projects, and the City's code enforcement officers met and agreed the demonstrators could use the megaphones at volume level 4 before 10:00 a.m. and at volume level 6 after 10:00 a.m., so that the demonstrators would have an objective measure of acceptable volume. (*See id.*).

From July 8 to July 26, the demonstrators complied with this agreement. (*See id.* ¶ 28). During the same period, however, the Hotel complained repeatedly to the City about the demonstrations and solicited other businesses in the area to complain to the City. (*See id.* ¶ 29). As a result, on July 25 the Council filed an unfair labor practice charge against the Hotel with the National Labor Relations Board. (*See id.* ¶ 30). The Council also ceased protests against the contractor working at the Hotel and instead began picketing the Hotel's unfair labor practices. (*See id.*). Although the motivation for and target of the picketing had changed, the format remained the same. (*See id.*). Then, on July 26, while the demonstrators were picketing in front of the Hotel on public property, a code enforcement officer approached the demonstrators and without warning issued a second citation for violating section 46-152. (*See id.* ¶ 31). The second citation, which imposed a $1,000 fine, contained no specific information about the demonstrators' conduct. (*See id.* ¶¶ 31, 46; Ex. 2 [D.E. 14-2]).

Before the City issued a third citation, City code enforcement officers and police officers began asking the demonstrators for their names, telling them the City would run warrant searches

on them. (*See Am. Compl.* ¶ 32). Nonetheless, demonstrations continued, and the City issued the Council a third citation — which imposed a $2,000 fine — for violating section 46-152 on July 30. (*See id.* ¶ 33). That day the demonstrators were using megaphones on the public sidewalk to the east (ocean) side of the Hotel rather than on Collins Avenue, but within the agreed volume level and pointed toward the ocean. (*See id.* ¶¶ 33–34). The third citation notes "protestors behind hotel . . . bullhorn unreasonably loud." (Ex. 3 [D.E. 14-2]). The Council's representative protested the citation, noting the Hotel plays music loudly — often louder than the megaphones — because the City Code has an exemption for noise on the ocean side of the Hotel. (*See Am. Compl.* ¶ 35). The officers replied the Hotel could make noise without violating the ordinance, while the Council could not, because the exemption is for property owners. (*See id.* ¶ 36).

The Council received two more citations for violating section 46-152 before it stopped demonstrating. On August 29, code enforcement officers issued the fourth citation, with a $3,000 fine, because a "megaphone [was] unreasonably loud at 12:26 p.m. . . . " outside the Hotel. (Ex. 4 [D.E. 14-2]; *see also Am. Compl.* ¶ 38). And on September 13 code enforcement officers issued the fifth citation, which simply noted "protesters [were] at the rear" of the Hotel. (Ex. 5 [D.E. 14-2]; *see also Am. Compl.* ¶ 39). Three days later, on September 16, the Council ceased demonstrating at the Hotel because of the threat of receiving additional, costly citations without prior warning as to why its conduct was unreasonable or unlawful. (*See id.* ¶ 41).

In all, between June 30 and September 15, the City's code officers issued the Council one warning and five citations for violating section 46-152. All the citations contained the standard, pre-printed language that the Council was violating the City's noise ordinance "by making, continuing, or causing to be made or continued any unreasonably loud, excessive, unnecessary or unusual noise,"

in addition to the code officers' handwritten notes. (Exs. 1–5; *see also Am. Compl.* ¶ 46). At no time, however, did any code enforcement officer take a decibel reading, cite an acceptable decibel level, or provide other criteria as the basis for the citations. (*See Am. Compl.* ¶¶ 25, 27).

Although the City's code officers enforce the noise ordinance, a citation may be challenged in an appeal to a special master, who conducts an evidentiary hearing on the matter and issues a ruling. (*See id.* ¶ 51). This is the only way to challenge a citation, as the City has no discretion to withdraw a citation after it is issued by a code enforcement officer. (*See id.* ¶¶ 51–52). For each of the first four citations, the Council has paid a $75 fee and appealed the citation to a special master. (*See id.* ¶¶ 24, 37–38). The Amended Complaint does not indicate whether the Council has appealed the fifth citation.

The Council alleges the City has selectively, arbitrarily, and subjectively enforced the noise ordinance. (*See id.* ¶¶ 45–47, 49–53). For example, the Council has been unable to properly advise its demonstrators on megaphone use because of the City's inconsistent enforcement — the City agreed to guidelines and thereafter issued citations to the Council when the demonstrators were complying with those guidelines. (*See id.* ¶¶ 40, 50). In addition, the City has penalized the Council based on the identity of the speaker rather than on the volume of the megaphones. (*See id.* ¶ 48). Finally, some of the Council's demonstrators no longer want to picket on Miami Beach because the code officers questioned them and threatened them with individual citations. (*See id.* ¶ 40).

The City moves to dismiss Counts I and II for failure to state a claim. It also moves to dismiss Count II for violating the pleading requirements of Rule 10(b), Federal Rules of Civil Procedure.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 556). To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1949).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). But pleadings that "are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 129 S. Ct. at 1950; *see also Sinaltrainal*, 578 F.3d at 1268 ("[U]nwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of the allegations."). A court's analysis of a Rule 12(b)(6) motion "is limited primarily to the face of the complaint and attachments thereto."

Brooks, 116 F.3d at 1368.

III. ANALYSIS

A. Count I — The Facial Challenge

The City argues Count I fails to state a claim because the Council received the citations for using megaphones, megaphones fall within section 21-28(b), and section 21-28(b) is constitutional. The Council concedes section 21-28(b) is facially constitutional,[4] but it argues "[t]hat particular subsection has no application whatsoever to the Council's demonstrations." (Pl.'s Resp. Opp'n Def.'s Mot. Dismiss ("*Resp.*") [D.E. 39] at 1). The Court concludes Count I fails to state a claim because: (1) the Amended Complaint alleges the Council received the citations for using megaphones; and (2) megaphones fall within section 21-28(b), which is facially constitutional.

Although the Council argues section 21-28(b) does not apply to its demonstrations, the Amended Complaint alleges the Council received the citations because of its megaphones, and not simply for its labor demonstrations. The warning cited the Council for violating section 46-152, not section 21-28(b), but it stated the Council received the citations because of its megaphones. The Council thereafter received five citations, three of which specifically referenced the Council's megaphones. And although two citations did not mention the megaphones, a warning is a legal prerequisite to a citation. *See* CITY CODE, *supra*, § 46-158(b)(2). Of course, the City could have issued a citation for other noise, such as chanting, without first issuing a warning; but the Amended Complaint offers no reason to believe the City violated the warning requirement. Neither does the Council argue the City issued the citations for any reason other than the megaphones. In fact, it concedes "[t]he City has not barred the Council from demonstrating at all, but it has attacked the

[4] *See DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254, 1265–72 (11th Cir. 2007).

Carpenters' preferred means of publicizing their dispute, namely the use of megaphones." (Mem. Supp. Pl.'s Mot. Prelim. Inj. ("*Mot. Prelim. Inj.*") [D.E. 9] at 7).

Moreover, other allegations in the Amended Complaint indicate the focus of this litigation is the Council's megaphones. When the parties met to discuss the Council's demonstrations after the first citation, they negotiated the volume of the megaphones; and the Council was shocked to receive additional citations because it was using the megaphones in compliance with the parties' agreement. The Council also alleges it has been penalized because the City did not issue the citations "based . . . on objective standards (i.e. the volume of its megaphones)." (*Am. Compl.* ¶ 48). Finally, the Council has stopped demonstrating because it "could [not] give its own demonstrators guidelines for using the megaphones." (*Id.* ¶ 40). Thus, the Amended Complaint taken as a whole alleges the Council received the citations because of its megaphones.

If megaphones fall within section 21-28(b), which is constitutional, Count I fails to state a claim. Section 21-28(b) prohibits:

> (b) *Radios, televisions, phonographs, etc.* The using, operating, or permitting to be played, used or operated any radio receiving set, television set, musical instrument, phonograph, *or other machine or device for the producing or reproducing of sound* in such manner as to disturb the peace, quiet and comfort of the neighboring inhabitants, or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such machine or device is operated and who are voluntary listeners thereto. . . .

COUNTY CODE, *supra*, § 21-28(b) (emphasis added). The question, then, is one of statutory construction: is a megaphone a machine or device for the producing or reproducing of sound?

The Eleventh Circuit "has repeatedly stated that '[w]e begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.'" *CBS Inc. v.*

PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (quoting *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000)). If the language of the statute is unambiguous, the judicial inquiry is over. *See id.* And where the statute does not define a term, courts give words their ordinary meaning. *See id.* "In order to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *Id.* at 1223. Using this approach, the Court concludes megaphones fall within section 21-28(b).

First, a megaphone is a machine or device. One definition of "machine" is "a mechanically, electrically, or electronically operated device for performing a task." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 744 (11th ed. 2005). And one definition of "device" is "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function." *Id.* at 342; *see also New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 211 n.23 (2d Cir. 2001) (describing megaphones as sound amplification devices). The ordinary meanings of machine and device both include a megaphone: it is an electronic piece of equipment used to amplify sound.

Second, a megaphone produces sound. "Produce" means, among other things, "to give being, form, or shape to: MAKE" and "to cause to have existence or to happen: BRING ABOUT." MERRIAM-WEBSTER'S, *supra*, at 991. Although a megaphone amplifies sound — such as a demonstrator's voice — it does so by *making* or *bringing about* more sound. That is why a megaphone is effective for the Council's demonstrations. Thus, the ordinary meaning of "producing . . . sound" includes using megaphones.

Third, it is possible to use a megaphone in a manner that violates section 21-28(b). Section 21-28(b) specifies two standards for when a machine or device for producing or reproducing sound is unreasonably loud: one for involuntary listeners and one for voluntary listeners. *See DA*

Mortgage, 486 F.3d at 1266 ("The ordinance regulates sound volume according to a standard that addresses the needs of two different audiences—a nuisance standard for involuntary listeners and what is presumably a public health standard for voluntary listeners."). A demonstrator using a megaphone could violate the involuntary listener standard by operating a megaphone "in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants." COUNTY CODE, *supra*, § 21-28(b).

In sum, a megaphone is a "machine or device for the producing . . . of sound" within section 21-28(b). Accordingly, Count I fails to state a claim.

B. Count II — The As-Applied Challenge

The City argues Count II should be dismissed for two reasons: (1) Count II fails to state a section 1983 claim under Federal Rule of Civil Procedure 12(b)(6) because the Council has not pled facts to support (a) municipal liability or (b) any of its various theories of discrimination; and (2) Count II fails to meet the pleading requirements of Federal Rule of Civil Procedure 10(b) because it raises multiple claims and theories of liability.

1. Rule 12(b)(6) — Failure to State a Claim

a. Municipal Liability Under Section 1983

Municipalities may not be held liable under 42 U.S.C. § 1983 on a *respondeat superior* theory, but they may be held liable for the execution of a governmental policy or custom. *See Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694 (1978). As a result, "[m]unicipal liability under § 1983 is incurred only where 'a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Owens v. Fulton County*, 877 F.2d 947, 949–50 (11th

Cir. 1989) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). Under *Monell*, if a final policymaker delegates decision-making discretion to a subordinate but retains the power to review the exercise of that discretion, the subordinate does not have final policymaking authority. *See Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997). In other words, an official does not have final policymaking authority when his or her decisions are subject to meaningful administrative review. *See Quinn v. Monroe County*, 330 F.3d 1320, 1325–26 (11th Cir. 2003).

Here, the Council does not allege action by a City official who has final policymaking authority. Although the Council alleges the City has no authority to revoke a citation after it is issued by a code enforcement officer, the Council also alleges: (1) a special master reviews citations and rules whether fines should be paid; (2) the special master conducts an evidentiary hearing at which a party may be represented by counsel; and (3) the Council has appealed four of the five citations for review by a special master.[5] Based on these allegations, the code enforcement officers are not final policymakers because the citations are subject to meaningful administrative review. *See Unuvar v. City of Key West*, No. 08-101209-CV, 2009 WL 2915783, at *3 (S.D. Fla. Sept. 11, 2009) (holding that where code enforcement officers' decisions are subject to review before a special master the officers are not final policymakers); *Criswell v. City of Dallas*, No. 3:00-CV-0687-G, 2001 WL 609480, at *2–3 (N.D. Tex. May 29, 2001) (same), *aff'd*, 31 F. App'x 836 (5th Cir. Jan. 25, 2002); *see also Quinn*, 330 F.3d at 1326 (holding that a full adversarial and evidentiary hearing was meaningful administrative review).

Thus, since Count II fails to allege action by a City official who has final policymaking

[5] Since the Council filed the Amended Complaint, the special master has ruled on the Council's appeals. (*See* Notice of Filing Order of Special Master [D.E. 56]). However, the special master's decision is not relevant to whether Count II, as alleged, states a claim. *See Brooks*, 116 F.3d at 1368.

authority, it fails to state a claim for municipal liability.[6]

b. Selective Enforcement Claim

The Council repeatedly alleges the City has selectively enforced the noise ordinance. (*See Am. Compl.* ¶¶ 49–51, 53). The City argues Count II does not contain allegations that support either element of a selective enforcement claim. (*See Mot. to Dismiss* at 17–21). In response, rather than defend a selective enforcement claim, the Council argues Count II can better be described as an arbitrary and subjective enforcement claim. (*See Resp.* at 4). To the extent Count II attempts to state a claim for selective enforcement under the equal protection clause, it fails to state a claim.

To state a claim for selective enforcement under the equal protection clause, plaintiffs must show: (1) they were treated differently from other similarly situated individuals, and (2) the defendants unequally applied a facially neutral ordinance in order to discriminate against them. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006); *GJR Investments., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998). Moreover, comparators are "similarly situated" only if they are "*prima facie* identical in all relevant respects." *Campbell*, 434 F.3d at 1314. For example, in *GJR Investments* the court dismissed a property owner's claim that a county had selectively enforced its zoning ordinance because the owner did not allege the county had granted a similarly situated property owner a building permit. *See* 132 F.3d at 1367–68.

The Council does not allege the City treated a similarly situated individual differently. The only possible comparator the Amended Complaint mentions is the Hotel — but the Council has failed to explain how it is similarly situated to the Hotel, and the Court does not see how a property

[6] The Council also failed to cite any authority suggesting the code enforcement officers are final policymakers. *See* Local Rule 7.1.C. ("Each party opposing a motion shall serve an opposing memorandum of law . . . . Failure to do so may be deemed sufficient cause for granting the motion by default.").

owner that operates a resort is similarly situated to labor demonstrators using megaphones. In sum, Count II fails to state a claim for selective enforcement under the equal protection clause.[7]

c. Arbitrary and Subjective Enforcement Claim

The Council also alleges in Count II the City's enforcement is both arbitrary, because the Council must guess at when and how it may use megaphones, and subjective, because the citations describe the noise from the Council's megaphones as "unreasonably loud" and "unnecessary." (*See Am. Compl.* ¶¶ 45–46, 50–51, 53). Thus, the Council argues, the City's "enforcement is perhaps better characterized as utterly arbitrary and subjective enforcement." (*Resp.* at 4).

To state a claim for arbitrary enforcement under the equal protection clause, which the Supreme Court has described as a "class of one" claim, a plaintiff must allege "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *accord Campbell*, 434 F.3d at 1314. As already discussed, the Council has not alleged the City treated it differently from a similarly situated individual. Count II fails to state a claim for arbitrary enforcement under *Olech*.

Moreover, the Council cites no authority for the proposition that it may raise an as-applied challenge for arbitrary and subjective enforcement — all the cases it cites found ordinances *facially* unconstitutional because they were *capable of* arbitrary and subjective enforcement. *See Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 489–90 (4th Cir. 1983) (finding the term "unnecessary" unconstitutionally vague); *Dae Woo Kim v. City of New York*, 774 F. Supp. 164,

[7] The Court need not address the City's discriminatory intent argument, as the lack of a similarly situated individual is a sufficient basis to dismiss the Council's selective enforcement claim.

169–70 (S.D.N.Y. 1991) (same); *Dupres v. City of Newport*, 978 F. Supp. 429, 433–34 (D.R.I. 1997) (finding the terms "unnecessary" and "unreasonably loud" unconstitutionally vague). The Council also argues in its Response, in support of Count II, the ordinance is *capable of* arbitrary and subjective enforcement. (*See Resp.* at 4–5). But Count II is an as-applied challenge, not a facial challenge. The Council has not explained how allegations of arbitrary and subjective enforcement — other than those that would be sufficient under *Olech* — state a claim for an as-applied challenge. In sum, Count II fails to state a claim for arbitrary and subjective enforcement.

d. Other Legal Claims and Theories

It is unclear whether Count II attempts to state other claims or legal theories. The Council does not explain in its Response whether Count II contains claims or theories other than the claims of selective, arbitrary, and subjective enforcement discussed above. Instead, the Council incorporates by reference its Motion for Preliminary Injunction, which raises multiple discrimination arguments. (*See Resp.* at 4). The Council, however, filed its Motion for Preliminary Injunction before it filed the Amended Complaint. In effect, the Council has invited the City — and the Court — to determine which portions of the Motion for Preliminary Injunction, if any, support the allegations in Count II of the Amended Complaint. That is not the job of the City or the Court, and the Court will not undertake such a task.

2. Rule 10(b) — Improper Form of Pleading

The City also argues Count II fails to meet the pleading requirements of Rule 10(b)[8] because it impermissibly mixes multiple claims and theories of liability. (*See Mot. to Dismiss* at 17, n.10). As just demonstrated, it is unclear from Count II whether the Council alleges a claim of selective enforcement, arbitrary and subjective enforcement, or something else. This is a violation of Rule 10(b) because separate counts "would promote clarity." FED. R. CIV. P. 10(b); *see also Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366–68 (11th Cir. 1996) (noting "shotgun" pleadings that require the Court to sort through myriad claims violate Rule 10(b)). To the extent Count II attempts to state multiple claims or theories, it is subject to being dismissed. *See* 2 MOORE'S FEDERAL PRACTICE § 10.03 (3d ed. 2009) (noting dismissal, with leave to amend, is an appropriate remedy for a Rule 10(b) violation).

IV. CONCLUSION

Consistent with the foregoing analysis, it is **ORDERED AND ADJUDGED** as follows:

1. The City's Motion to Dismiss [**D.E. 33**] is **GRANTED**.

2. Count I is dismissed for failure to state a claim under Rule 12(b)(6).

3. Count II is dismissed for failure to state a claim under Rule 12(b)(6) and for violating the pleading requirements of Rule 10(b).

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[8] Rule 10(b) provides:

> A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

FED. R. CIV. P. 10(b).

4. The Council is granted leave to file an amended complaint on or before **December 28, 2009.**

5. The Council's Motion for Preliminary Injunction [**D.E. 8**] is **DENIED** without prejudice to re-file pending the filing of an amended complaint that states a claim. The hearing scheduled for December 16, 2009 is CANCELLED and will be re-set upon the filing of a motion for preliminary injunction that addresses the operative claim or claims then in existence.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of December, 2009.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record